

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones
BILL JONES
SECRETARY OF STATE

In re:)
Request for Regulatory) 1999 OAL Determination No. 13 ²
Determination filed by)
MICHAEL C. MANCHESTER) [Docket No. 97-018]
regarding the Claims)
Verification Manual,) May 7, 1999
including the Victims of)
Crime Payment Schedule,) Determination Pursuant to
and other policies of the) Government Code Section
STATE BOARD OF CONTROL) 11340.5; Title 1, California
concerning the Victims of) Code of Regulations,
Crime Program¹) Chapter 1, Article 3
_____)

Determination by: CHARLENE G. MATHIAS, Deputy Director

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SYNOPSIS

The Office of Administrative Law concludes that certain rules establishing claims processing procedures and restricting payments to victims of crime are "regulations" which are invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act.

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DECISION

The issue presented is whether the following rules of the State Board of Control are "regulations" and are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"): ³

- (1) The Claims Verification Manual and in particular the Victims of Crime Payment Schedule (Appendix L of the Income Loss and Reimbursements section).
- (2) The statement in a letter from the Board dated December 18, 1996 addressed to the requester that "...VOC [Victims of Crime] Program income loss awards are based on the *net* amount a claimant would have received had he or she been working at the time of the crime."
- (3) A policy of not complying with section 13961(b)(2) of the Government Code by failing to provide information explaining the procedure to be used to evaluate an applicant's claim when providing application forms.
- (4) A policy that new and additional evidence not reasonably available to the applicant at the time of the hearing must be deemed relevant by staff in order to be considered by the Board for purposes of requests for reconsideration.
- (5) A policy of non-compliance with section 13962(a) of the Government Code by failing to return an incomplete application to the applicant.

OAL has determined⁴ that:

- (1) The Claims Verification Manual contains material, in particular the Victims of Crime Payment Schedule (Appendix L of the Income Loss and Reimbursements section), which is a "regulation."
- (2) The statement in the letter dated December 18, 1996 from the Board to the requester that "...VOC Program income loss awards are based on the *net* amount a claimant would have received had he or she been working at the time of the crime" may be the only reasonable interpretation of statute. However, the requester has alleged that the Board had previously paid

awards at the *full* amount of the lost wages. The Board did not respond to this allegation. If the Board previously paid income loss awards at the full amount of the lost wages, then the Board has given at least two interpretations to the statute. If the Board has given multiple interpretations to the statute, then the statement in the December letter is not the only reasonable interpretation of the statute--it is a "regulation."

after it was determined that such awards are not taxable, it would be difficult to accept the argument that the current policy of paying at "net" to be the only reasonable interpretation of statute.

- (3) A policy of failing to provide information explaining the procedure to be used to evaluate an applicant's claims when providing application forms, if such a policy exists, is a "regulation."
- (4) A policy that new and additional evidence not reasonably available to the applicant at the time of the hearing must be deemed relevant by staff in order to be considered by the Board for purposes of requests for reconsideration, if such a policy exists, is a "regulation."
- (5) A policy of failing to return incomplete applications to the applicant, if such a policy exists, is a "regulation."

DISCUSSION

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE STATE BOARD OF CONTROL?

Created in 1911,⁵ the State Board of Control ("Board") is the administrative board responsible for adjudicating monetary claims filed against the State of California.⁶ In this capacity the Board reviews and pays claims filed under the Victims of Crime Program. The Victims of Crime Program is designed to "assist residents of the State of California in obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts."⁷

Government Code section 13920 expressly provides:

(b) Governing the presentation and audit of claims against the state for which an appropriation has been made or for which a state fund is available.

....”

In addition, the APA applies to all state agencies, except those “in the judicial or legislative departments.”⁸ Since the Board is in neither the judicial nor the legislative branch of state government, OAL concludes that APA rulemaking requirements generally apply to the Board.⁹

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

"... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement or revision of any rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ["]regulation["] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. (Emphasis added.)"

In *Grier v. Kizer*,¹⁰ the California Court of Appeal upheld OAL's two-part test¹¹ as to whether a challenged agency rule is a "regulation" as defined in the key

provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* (Emphasis added.)"¹²

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "[a] statutory scheme which the Legislature has [already] established. . . ."¹³ But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."¹⁴

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)¹⁵ held that a terse 24-word definition of "intermediate

physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.¹⁶ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

"... the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]"¹⁷

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

Challenged Rules

The requester alleges that the following "... are regulations such as should have been formally adopted and filed with the Secretary of State and are unenforceable if they have not been:"¹⁸

- (1) The Claims Verification Manual and in particular the Victims of Crime Payment Schedule (Appendix L of the Income Loss and Reimbursements section)
- (2) The statement in a letter from the Board dated December 18, 1996 addressed to the requester that "...VOC Program income loss awards are based on the *net* amount a claimant would have received had he or she been working at the time of the crime."
- (3) A policy of not complying with section 13961(b)(2) of the Government Code by failing to provide information explaining the procedure to be used

to evaluate an applicant's claim when providing application forms to inquirers.

- (4) A policy that new and additional evidence not reasonably available to the applicant at the time of the hearing must be deemed relevant by staff in order to be considered by the Board for purposes of requests for reconsideration.
- (5) A policy of non-compliance with section 13962(a) of the Government Code by failing to return an incomplete application to the applicant.

The Board responds¹⁹ that "[t]he challenged policies do not bind the public or the Board and therefore, are not 'regulations.'"²⁰ The Board states that:

"In properly assessing this request, it is important that the OAL understand the nature of the relationship between Board staff and the Board, as well as their respective spheres of responsibility and authority. Board staff review applications, request necessary verification, and assess eligibility consistent with the programs's legal requirements. However, claims processing staff do not make final administrative decisions concerning applications; the Board does.

Once a staff member completes the necessary verification, a *recommendation* is made to the Board to allow or disallow, in whole or part, the requested assistance (Reg. section 649.20(b); see Reg. section 649(h).) If the staff member recommends that the Board allow the claim, it is placed on the Board's consent hearing agenda, and the recommendation is adopted as the Board's decision. (Reg. section 649.20(c).) If the staff member recommends disallowance, the applicant is given an opportunity to request a discussion hearing before the Board. (Reg. section 649.20(d).) If the applicant timely requests a discussion hearing, one is held before the Board or a hearing officer. (Section 13963; Reg. section 649.20(e), (f).) The final decision on the claim rests with the Board. (Reg. sections 619.2; 619.5.)" [Emphasis in original.]

The Board apparently contends that the Claims Verification Manual, including the

Victim of Crimes' Payment Schedule (Appendix L of the Income Loss and Reimbursement section), is only binding *on Board staff* and not the public because the Board ultimately makes the final decision on all claims and therefore these are not standards or rules which must be adopted pursuant to the APA.²¹ However, The California Court of Appeal has made clear that reviewing authorities are to focus on the content of a challenged rule, not the label placed on the rule by the agency.²² More important than the agency's characterization of the challenged rule is the nature of the effect and impact of the rule on the public.²³

The Board's Claims Verification Manual, including the Victim of Crimes Payment Schedule, would have to be characterized as a mandatory guideline for staff in obtaining verification and setting payment amounts. Although the Board apparently asserts that this document merely directs the actions of Board staff, its effect on the public is unquestionable. For example, it specifies what documentation will be required of the claimant to substantiate income loss²⁴ and what the amount of the income loss award will be.²⁵ By regulation, the claimant has 45 days from receipt of the staff's recommendation to request in writing that the matter be set for Board hearing to contest the staff recommendation.²⁶ Failure on the part of the claimant to so request a hearing will result in the matter being placed on the Board's consent hearing agenda.²⁷ As such, if a claimant fails to undertake the affirmative steps of appealing the staff recommendation, his or her claim is determined strictly by the guidelines specified in the Claims Verification Manual.

Although the procedure for appealing a Board staff recommendation is provided for in regulation, the guidelines, which include the verification requirements imposed upon the claimant and the amount of the income loss award granted to the claimant, are not. It is clear that a "guideline" is one type of policy which the Legislature sought to prohibit in Section 11340.5 insofar as it contains "regulations" which should have been, but were not, adopted pursuant to the APA. Government Code section 11340.5 prohibits state agencies from issuing or utilizing "any *guideline*, criterion, . . . standard of general application, or other rule which is a 'regulation' as defined in the APA." (Emphasis added.)

It may be that the Board is analogizing compliance with the guidelines contained in the Claims Verification Manual with the creation of a rebuttable presumption. The recommendation of the Board staff based upon the guidelines in the Claims Verification Manual results in a presumption on the validity of the claim and the

amount of the award. That presumption is rebuttable by the claimant appealing that recommendation to the Board and providing evidence at the hearing which may vary from that specified in the guidelines. If this is the Board's position, such a position does not solve the APA problem: provisions *creating rebuttable presumptions* have specifically been found by the Court of Appeal to be "regulations."²⁸

OAL will next address whether each challenged document and policy has general application.

1. Claims Verification Manual/Victims of Crime Payment Schedule

The Claims Verification Manual is an extensive document with multiple components. The Income Loss and Reimbursements section explains who is eligible for income loss benefits, what information must be verified, how to verify the information and calculate a victim's income loss, and when to apply any sources of reimbursement such as workers' compensation, state disability insurance, or private income protection insurance.²⁹ The Victims of Crime Payment Schedule (Appendix L of Income Loss and Reimbursements section) is a chart setting forth the VOC weekly benefit amount based upon the annual or weekly gross wages of the applicant.

For an agency rule to be of "general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³⁰ The challenged documents apply to all applications received from residents of California who seek reimbursement under the Victims of Crime. Therefore, this policy is a standard of general application.

2. Letter stating VOC Program income loss awards are based on the net amount of the claimant's earnings.

The statement in the letter dated December 18, 1996 from the Board to the requester that "...VOC Program income loss awards are based on the *net* amount a claimant would have received had he or she been working at the time of the crime" also appears to apply to all residents of the State of California who submit claims for reimbursement under the Victims of Crime Program and, therefore, is a standard of general application.

3. **A policy of non-compliance with section 13961(b)(2) of the Government Code by failing to provide information explaining the procedure to be used to evaluation an applicant's claims when providing application forms.**

Government Code section 13961 provides in pertinent part:

“(a) A victim or derivative victim may file an application for assistance with the board.

(b) The board shall supply and make available an application form for this purpose. The form shall be in one part, in layman's terms, and shall be accompanied by information including, but not limited to, all of the following:

...

(2) Information explaining the procedure to be used to evaluate an applicant's claims.

...”

The requester alleges that the Board has a policy of non-compliance with the above requirement in that it does not provide such information with the application form and does not make this information available “. . . unless an applicant is willing to expend enormous amounts of time and effort to obtain it.”³¹ The Board responds simply that it does not have a policy of non-compliance with Government Code section 13961(b)(2).³²

It must be clarified here that OAL does not have investigatory powers nor does OAL function in an investigative manner such that it can make determinations of fact as to the truth or falsity of the above contentions. Rather, upon a request for determination submitted pursuant to Government Code section 11340.5, OAL is required to provide a written determination as to whether the rule challenged by the requester is a “regulation” as defined under the APA. For purposes of making this determination, OAL will assume that the challenged policy exists. If the challenged policy exists and is determined to be a “regulation,” then the Board's failure to adopt the policy under the requirements of the APA renders the policy invalid and unenforceable.³³ It should be clarified that a contrary finding by OAL,

i.e., that the policy is not a “regulation,” does not mean that OAL has determined the policy to be legally valid, only that the policy, if it exists, does not meet the statutory definition of a “regulation.”³⁴

The policy as challenged applies to all California residents receiving a VOC application form and, therefore, is a standard of general application.

4. **A policy that new and additional evidence not reasonably available to the applicant at the time of the hearing must be deemed relevant by staff in order to be considered by the Board for purposes of requests for reconsideration.**

Section 649.21 of Title 2 of the California Code of Regulations provides in pertinent part:

“ . . . Requests for reconsideration shall not be granted unless the applicant produces new and additional evidence not reasonably available to the applicant at the time of the hearing”

The requests alleges that the Board has implemented a policy that such evidence must first be deemed relevant by the staff of the Board in order to be considered by the Board for purposes of a reconsideration request.³⁵ The Board denies this allegation and states that neither staff nor the Board exclude evidence from consideration.³⁶ For the reasons previously discussed, OAL will assume for purposes of this determination that the challenged policy exists. The policy as challenged applies to all requests for reconsideration made by California residents as to their VOC claim and, therefore, is a standard of general application.

5. **A policy of non-compliance with section 13962(a) of the Government Code by failing to return an incomplete application to the applicant.**

Government Code section 13962, subdivision (a), provides in pertinent part:

“The staff of the board shall review all applications for assistance in order to ensure that they are complete. If an application is not complete, it shall be returned to the applicant with a brief statement of the additional information required. . . .”

The requester alleges that the Board has a policy of not returning applications determined to be incomplete by the Board. The requester states that when his initial application was rejected by the Board as incomplete, he was sent only the blank signature page from the application and a "Post It" note.³⁷ The Board does not admit that it has such a policy, but rather states that it "... attempts to assist applicants in submitting all required and necessary materials in an efficient manner."³⁸ For the reasons discussed above, for the purposes of this determination, OAL will assume the challenged policy exists. The policy as challenged applies to all California residents submitting applications for a claim under the VOC program and, therefore, is a standard of general application.

B. DO THE CHALLENGED RULES INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

In 1974, the Legislature adopted Government Code section 13959, also known as "California's Victims of Crime Act." Amended in 1982 and 1983, this statute now provides that:

"It is in the public interest to assist residents of the State of California in obtaining *restitution for the pecuniary losses they suffer as a direct result of criminal acts*. This article shall govern the procedure by which crime victims may obtain restitution through compensation from the Restitution Fund." (Emphasis added.)

"Pecuniary loss" is defined as an expense for which the victim or derivative victim has not been and will not be reimbursed from any other source.³⁹ A "pecuniary loss" includes "... [t]he loss of income that the victim or the loss of support that the derivative victim has incurred or will incur as a direct result of an injury or death."⁴⁰

Government Code section 13961, subdivision (a), provides that a victim of a crime may file an application for assistance with the State Board of Control. Government Code section 13965, subdivision (a)(7), provides that the total award to or on behalf of the victim shall not exceed twenty-three thousand dollars (\$23,000.00).

The Board may verify information it deems necessary regarding an application.⁴¹ Government Code section 13964, subdivision (a), provides that after hearing

evidence relevant to the application for assistance, the Board is required to approve the application if a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss. Once an application for assistance is approved, the Board may:

“Authorize a cash payment to the victim equal to the pecuniary loss resulting from loss of wages directly resulting from the injury. . . .”⁴²

The duly adopted regulations of the Board of Control which relate to the Victims of Crime program are found at sections 649 through 649.72, Title 2, California Code of Regulations (“CCR”).

1. Claims Verification Manual and in particular the Victim of Crimes payment Schedule (Appendix L of the Income Loss and Reimbursements section).

The Board states that the Claims Verification Manual including the VOC Payment Schedule “. . . are required by and consistent with the program’s statutory and regulatory authority.”⁴³ The Board contends that its policies concerning income loss awards do not implement, interpret, or make specific the law enforced or administered, but rather “. . . merely effectuate statutory and regulatory requirements that are self-executing.”⁴⁴

The Board states:

“In *Blazevich v. The State Board of Control* (1987) 191 Cal.App.3d 1121, 1126, 237 Cal.Rptr. 35, 37, the Court held that the program compensates victims for out-of-pocket pecuniary losses. Since program awards are not taxable (I.R.S. Rev. Rul. 74-74, 1974 WL 34523), in order to be compensated for the out-of-pocket loss, that is, the amount of money the victim lost as a direct result of the crime, tax liability must be taken into consideration. Not to do so would enrich the applicant as a result of the crime.”⁴⁵

The Board apparently takes the position that since VOC program awards are not taxable and must be limited to out-of-pocket pecuniary losses, the VOC Payment Schedule which reduces program awards based upon estimated tax liability is merely a restatement of existing law.

In 1989,⁴⁶ OAL rejected a similar argument, while explaining:

“In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and ‘its application.’ Such an enactment is simply ‘administrative’ in nature, rather than ‘quasi-judicial’ or ‘quasi-legislative.’ If, however, the agency makes new law, i.e., supplements or ‘interprets’ a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power.”

Citing an earlier OAL Determination, OAL went on to explain:

"If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created."⁴⁷ [Emphasis added.]

The issue is whether the VOC Payment Schedule merely restates existing law which has only one legally tenable interpretation. As previously discussed, the Victims of Crimes Act authorizes a cash payment to the victim equal to the pecuniary loss resulting from loss of wages directly resulting from the injury.⁴⁸ A “pecuniary loss” is an expense for which the victim has not been and will not be reimbursed from any other source.⁴⁹ A “pecuniary loss” includes the loss of income that the victim has incurred or will incur as a direct result of an injury or death.⁵⁰ In *Blazevich v. State Board of Control*, the appellate court found that the Victims of Violent Crimes Act was intended to provide recovery only for out-of-pocket losses.⁵¹ Based upon the foregoing, a strong argument can be made that, because loss of income awards are not taxable, they must be reduced by what would have been the recipients income tax liability had he or she been able to work.

However, it cannot be said that the VOC Payment Schedule is merely a restatement of existing law. The VOC Payment Schedule is a chart whereby income loss awards are reduced by the estimated income tax liability of the recipient based strictly on the recipient’s annual or weekly gross salary. No provision is made in the VOC Payment Schedule for deductions, credits, or anything else which might in fact have reduced the recipient’s tax liability. The VOC Payment Schedule is thus not the only legally tenable manner of determining the income loss award reduction due to income tax liability. In this regard, it should be noted that the Board used another method to calculate income loss

awards on claims submitted prior to January 1, 1996. The following is an excerpt from page 20 of the Income Loss and Reimbursements section of the Claims Verification Manual.

“New Calculation Method”

“The Board has adopted a method to provide an easier and faster way to calculate income loss along with new forms and instructions. This new method will only impact those income loss awards calculated on or after January 1, 1996, WHERE NO PREVIOUS INCOME LOSS HAS BEEN PAID. For income loss claims calculated, processed, or paid prior to January 1, 1996, the previous procedures for calculating the net loss will apply. Implementation in this manner is intended to avoid a difference or variation in the income loss benefits that a victim is already receiving. It will also enable the Claims Specialist or JP Verifier to use previous calculations for determining any additional net loss.

In an effort to make income loss calculation easier and avoid calculation errors, the Program has developed a payment schedule (Appendix L). Use of this schedule is similar in concept to that used by other benefit programs.”

In *Grier v. Kizer*,⁵² the Court of Appeal rejected a similar restatement argument by the Department of Health Services. In that case the Department argued that:

“... there was no need to promulgate a regulation because the only legally tenable interpretation of its statutory auditing authority [was] that statistical sampling and extrapolation procedures must be utilized.”

The Court rejected that argument by finding that other auditing procedures, although perhaps not as feasible or cost effective, existed. Thus, the sampling method was not the only “*tenable*” interpretation of the statute. (Emphasis in original.)

OAL concludes that the VOC Payment Schedule implements, interprets, and makes specific the law enforced or administered by the Board and is a

“regulation,” which is invalid unless adopted pursuant to the APA.

OAL does not have the resources to pursue a line by line determination as to the entire contents of the Board’s extensive Claims Verification Manual. However, it is clear that the Claims Verification Manual includes provisions in addition to the VOC Payment Schedule, which implement, interpret, and make specific the law enforced and administered by the Board rather than merely restating it, which constitute a “regulation” and would be invalid unless adopted pursuant to the APA. For example, the Self Employment portion of the Claims Verification Manual is quite specific concerning the documentation required of claimants. The Introduction on page U-1 of the Self Employment portion states:

“The purpose of this section is to introduce various types of self-employment and provide instruction on *what documentation will be required* in order to substantiate if a self-employed person has incurred an income loss.” (Emphasis added.)

Paragraph no. 5 on page U-3 of the Self-Employment portion requires

“When requesting tax returns that have been filed jointly and both spouses have reported income, *copies of all Wage and Income Statements (1099 - NEC, W-2 forms) in addition to the complete tax return including all Profit or Loss Statements, must be submitted* in order to identify the actual income of the victim/claimant.” (Emphasis added.)

By contrast, existing section 649.9 of the Title 2 of the California Code of Regulations provides more generally in subsection (b)(2):

“If loss of income is claimed to have occurred as a direct result of the crime, the applicant shall produce evidence of income loss as well as a statement of disability from the treating medical or mental health provider.

“Evidence of loss of income *may include but not be limited to*, documentation of earnings immediately preceding the date of the crime such as copies of all wage check stubs for periods immediately preceding the date of the crime, or copies of all state and federal

income tax returns filed by the victim or applicant for the tax year immediately preceding the date of the crime or during the year of the crime, if available, or a Statement of Wages or Income as used to file with federal or state taxing authorities such as a W-2 IRS form actually filed with the taxing authorities, or a statement signed by the employer attesting to the payment of wages or income to the victim which statement shall include the name, telephone number and address of the employer or person who paid or would have paid the wages or income along with the employer's Federal Identification Number. . . ."

Paragraph no. 5 on page U-3 of the Self Employment portion of the Claims Verification Manual is clearly not merely a restatement of existing law, but rather makes specific exactly which documents are required of the claimant in a particular situation.

2. **The statement in the letter dated December 18, 1996 from the Board to the requester that "... VOC Program income loss awards are based on the *net* amount a claimant would have received had he or she been working at the time of the crime."**

Since loss of income awards are not taxable, the Board makes a strong case that the only legally tenable interpretation of the applicable statutes and the *Blazevich* decision is that the income loss awards must be reduced by what would have been the recipient's tax liability. It would appear then that challenged rule no. 2 may not implement, interpret, or make specific the law enforced or administered by the Board, but rather merely restates it. However, it should be noted that the requester has asserted that the Board formerly paid income loss reimbursement awards at 100%, i.e., without reduction for what would have been the recipient's income tax liability.⁵³ The Board made no mention one way or the other of the existence of such a prior policy in its response. If in fact the Board has previously taken the position (after it was determined that income loss awards were not taxable) that income loss awards should be paid at the full amount of the lost wages as claimed by the requester, it would be difficult to accept the Board's argument that challenged rule no. 2 is now the only legally tenable interpretation of existing law.

3. **A policy of non-compliance with section 13961(b)(2) of the Government Code by failing to provide information explaining the procedure used to**

evaluate an applicant's claim when providing application forms.

4. A policy that new and additional evidence not reasonably available to the applicant at the time of the hearing *must be deemed relevant by staff* in order to be considered by the Board for purposes of requests for reconsideration.
5. A policy of non-compliance with section 13962(a) of the Government Code by failing to return an incomplete application to the applicant.

With respect to challenged rules nos. 3, 4, and 5, it is clear that they are not restatements of existing law but rather implement, interpret, or make specific (and may even be inconsistent with) the law enforced or administered by the Board. If these rules exist, they are "regulations."

III. DO THE CHALLENGED RULES, WHICH HAVE BEEN FOUND TO BE "REGULATIONS," FALL WITHIN ANY *SPECIAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

In its response, the Board does not contend that any special exemption applies. OAL concurs. *No exemption applies to the rules found to be "regulations" now, or at the time the request was filed.*

IV. DO THE CHALLENGED RULES, WHICH HAVE BEEN FOUND TO BE "REGULATIONS," FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.⁵⁴ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.⁵⁵

INTERNAL MANAGEMENT

The Board contends that:

"[e]ven if OAL determined that the alleged policies were rules or

standards of general application they are exempt from the rulemaking requirements of the APA because they relate only to the internal management of the Board.”⁵⁶

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of individual state agencies from APA rulemaking requirements:

"Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

Internal management policies are those designed to govern the internal operations of an agency. The exception does not apply to “. . .the rules necessary to properly consider the interests of all . . .under the . . .statutes. . . .”⁵⁷ *Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] “Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*” [Fn. omitted.]’ . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: “‘Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only

the academic community.” . . . [Citation.][⁵⁸]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."⁵⁹

It is self-evident that the challenged rules extend well beyond mere management of the internal affairs of the Board, but are rather rules of general application affecting claims submission, verification, determination of award amounts, reconsideration, and other aspects of VOC Program.

However, the Board contends that

"The challenged policy is similar in nature to one subject to an earlier request for determination. The Board's policy of requiring psychotherapy expenses provided by a licensed clinical social worker or marriage, family and child counselor billed a \$80 or more an hour, and those provided by a medical doctor or psychologist for \$100 or more an hour to be reviewed by the Board was found to relate only to the Board's internal management, and was exempt from the APA. (1988 OAL Determination No. 3.) The challenged policies are similar and, therefore, relate only to the internal management of the Board."⁶⁰

In 1988 OAL Determination No. 3, referred to by the Board as the "earlier request for determination," OAL was asked to determine whether the following policy contained in a Board memorandum concerning claims submitted pursuant to the

Victims of Crime Act was a regulation required to be adopted in compliance with the APA.

“Psychotherapy expenses verified at \$80 per hour or more when provided by a L.C.S.W. or M.F.C.C. will be discussed by the Board. Therefore, verification will be placed on the General Comments page”⁶¹

OAL found:

“If the rule does, in fact, merely instruct the Board’s staff to route the claims to the Board for ‘discussion,’ without requiring more, such a rule relates only to the internal management of the Board.

If, however, the Board uses the rule to impose additional procedural requirements, such as requiring appearance at a hearing, or if the Board routinely denies all claims for psychotherapy expenses exceeding a certain hourly rate, such a rule affects victims of crime statewide. It is a standard of general application which implements, interprets, or makes specific the law administered by the Board and involves matters of serious consequence involving an important public interest. The Legislature has clearly stated that there is a public interest in assisting Californians in ‘obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.’ Without doubt, an uncodified policy which limited the degree to which victims could obtain restitution would be a matter ‘of serious consequence.’ The argument that such rules, though affecting the public, fall within the ‘internal management’ exception has been consistently rejected by appellate courts, and has been discussed in several determinations.”⁶²

Clearly, the Claims Verification Manual, including the Victims of Crime Payment Schedule, and the other challenged rules that are the subject of this determination are best described by the paragraph quoted immediately above and do not meet the requirements for the internal management exception.

RATES, PRICES, OR TARIFFS

The Board apparently contends that the Victims of Crime Payment Schedule is exempt from the requirements of the APA pursuant to the “rates, prices, or tariffs” exception. The Board states that if “. . . deducting estimated tax liability from an income loss award is a regulation, it is exempt from the APA because it does nothing more than establish the rate by which income loss is compensated.”⁶³

Government Code section 11343 states:

“Every state agency shall:

(a) Transmit to [OAL] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:

(1) Establishes or fixes rates, prices, or tariffs.

. . . .”

Exceptions to the APA should be narrowly construed to further the goals of meaningful public participation and effective judicial review.⁶⁴ This being the case, courts have on several occasions noted that rules found to be exempt from APA requirements under the rates, prices or tariffs exception generally are established through an alternative statutory procedure involving public input.⁶⁵ In *California Assn. Of Nursing Homes Etc. Inc. v. Williams*⁶⁶ the court rejected the agency’s argument that the setting of Medi-Cal rates is within the “rates, prices, or tariffs” exemption:

“Usually, when a state law directs an agency to promulgate rates or tariffs binding on the public, the same law fixes its own procedure for hearings upon notice to the public.”

We are not aware of any alternative statutory procedure involving public input being used in the reduction of income loss awards amounts as established in the Victims of Crime Payment Schedule.

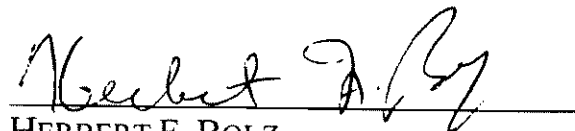
OAL concludes that no general exemption applies here.

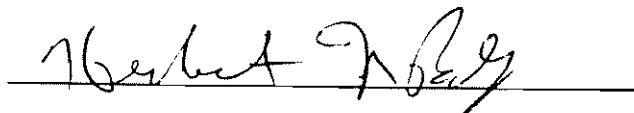
CONCLUSION ⁶⁷

For the reasons set forth, OAL finds that:

- (1) The Board's Claims Verification Manual includes material, in particular the Victims of Crime Payment Schedule (Appendix L of the Income Loss and Reimbursement section), which is a "regulation" and without legal effect unless adopted pursuant to the APA.
- (2) The statement in the letter dated December 18, 1996 from the Board to the requester that "...VOC Program income loss awards are based on the *net* amount a claimant would have received had he or she been working at the time of the crime" may be the only reasonable interpretation of statute and not be a "regulation." However, if, as the requester alleges, the Board has, in fact, given the statute multiple interpretations, this statement constitutes a "regulation."
- (3) A policy (if it exists) of failing to provide information explaining the procedure to be used to evaluate an applicant's claims when providing application forms is a "regulation" and without legal effect unless adopted pursuant to the APA.
- (4) A policy (if it exists) that new and additional evidence not reasonably available to the applicant at the time of the hearing must be deemed relevant by staff in order to be considered by the Board for purposes of requests for reconsideration is a "regulation" and without legal effect unless adopted pursuant to the APA.
- (5) A policy (if it exists) of failing to return an incomplete application to the applicant is a "regulation" and without legal effect unless adopted pursuant to the APA.

DATE: May 7, 1999


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ENDNOTES

1. This Request for Determination was filed by Michael C. Manchester, P.O. Box 1106, Santa Monica, CA 90406-1106. The State Board of Control was represented by Judith A. Kopec, Senior Staff Counsel, P.O. Box 48, Sacramento, CA 95812-0048, (916) 327-4016.

2. This determination may be cited as **"1999 OAL Determination No. 13."**

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA.
[Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. Stats. 1911, Ch. 349, p. 590.
6. See Government Code sections 13901 and 13920.
7. See Government Code section 13959.
8. Government Code section 11342, subdivision (a).
9. See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932,943; 107 Cal.Rptr. 596, 609.
10. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

11. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

12. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
13. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274, review denied.
14. *Id.* at p. 275.
15. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
16. *Id.*
17. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
18. Request for Determination, p. 1.
19. It must be noted that the requester has objected to OAL's consideration of the Board's response in that the requester's copy was not postmarked until February 8, 1999 (after the deadline for submitting the response to OAL per 1 CCR 125). However, in addition to a mailing on February 5, 1999, OAL apparently received a copy of the Board's response by personal service on February 5, 1999. Even though the requester's copy did not receive a postmark until February 8, 1999, there would appear to be substantial compliance with the requirements of 1 CCR 125 in that OAL received a copy of the agency's response within the required time frame. (*United Systems of Arkansas v. Stamison* (1998) 63 Cal.App. 4th 1001, 74 Cal.Rptr 2d 407.)
20. Agency Response, p. 5.
21. Agency Response, pp. 3 and 5.

22. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1983), *supra*.
23. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
24. Claims Verification Manual, Self-Employment section, p. U-1, U-3.
25. Claims Verification Manual, Income Loss and Reimbursements section, p. 20.
26. California Code of Regulations, Title 2, section 649.20(e).
27. California Code of Regulations, Title 2, section 649.20(e).
28. *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501, 277 Cal.Rptr. 886, 892.
29. Claims Verification Manual, Income Loss and Reimbursements, p. 1.
30. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class.)
31. Request for Determination, p. 4.
32. Agency Response, p. 4.
33. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
34. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)
35. Request for Determination, p. 6.
36. Agency Response, p. 4.

37. Request for Determination, p. 7.
38. Agency Response, p. 5.
39. Government Code section 13960, subdivision (d).
40. Government Code section 13960, subdivision (d)(3).
41. Government Code section 13962, subdivision (b).
42. Government code section 13965, subdivision (a)(2).
43. Agency Response, p. 4.
44. Agency Response, p. 5.
45. Agency Response, p. 5.
46. OAL Determination No. 15 [Docket No. 89-002] Oct. 10, 1989.
47. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.
48. Government Code section 13965, subdivision (a)(2).
49. Government Code section 13960, subdivision (d).
50. Government Code section 13960, subdivision (d)(3).
51. (1987) 191 Cal.App.3d 1121, 237 Cal.Rptr. 35, 37.
52. *Id.*, at 436; 268 Cal.Rptr., at 254.
53. Request for Determination, pp. 3 and 4.
54. Government Code section 11346.
55. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

- c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.
- 56. Agency Response, p. 5.
 - 57. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 3.
 - 58. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
 - 59. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
 - 60. Agency Response, p. 6.
 - 61. 1988 OAL Determination No. 3, p. 5.
 - 62. 1988 OAL Determination No. 3, p. 10.
 - 63. Agency Response, p. 6.
 - 64. The significant advantages of public participation in agency rulemaking are noted in *NLRB v. Wyman-Gordon Company* (1969) 394 U.S. 759, 777-779, 89 S.Ct. 1426,

1436 (Douglas, J., dissenting), quoted in *San Diego Nursery Company, Inc. v. ALRB* (1979) 100 Cal.App.3d 128, 160 Cal.Rptr. 822, 831:

“The rulemaking procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. Recently the proposed Rules of the Federal Highway Administration governing the location and design of freeways, 33 Fed.Reg. 15663, were put down for a hearing; and the Governor of every State appeared or sent an emissary. The result was a revision of the Rules before they were promulgated. 34 Fed.Reg. 727.

“That is not an uncommon experience. Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, *The Federal Administrative Agencies* 45 (1962).

This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

“ . . .

“Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.”

65. *State Compensation Insurance Fund v. McConnell* (1956) 46 Cal. 2d 330, 343 (Ins. Code section 11734); *California Association of Nursing Homes v. Williams* (1970) 4 Cal.App.3d 820, 85 Cal.Rptr. 735. See also *Alta Bates Hospital v. Lackner* (1981) 118 Cal.App.3d 614, 623 and 624 n.5, 175 Cal.Rptr. 196, 201 (former Welfare and Inst. Code section 14120(f)--required consultation with concerned provider groups before cutting Medi-Cal reimbursement rates).
66. (1970) 4 Cal.App.3d 800, 85 Cal.Rptr. 735.
67. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition

of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4**, California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).